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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Christian Louis Wrathall,) No. CIV 08-415-PHX-GMS (GEE)
10 Petitioner,)
11 vs.) **REPORT AND**
12 E.W. Morris, Warden; et al.,) **RECOMMENDATION**
13 Respondents.)
14 _____)

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16 On February 29, 2008, Christian Louis Wrathall, an inmate confined in the Great Plains
17 Correctional Facility in Hinton, Oklahoma, filed a Petition for Writ of Habeas Corpus pursuant
18 to Title 28, United States Code, Section 2254. (Petition.); [doc. #1] He argues the Arizona trial
19 court erred when it imposed consecutive, rather than concurrent, sentences. The respondents
20 filed an answer, and the petitioner filed a reply. After the court ordered supplemental briefing,
21 the respondents filed a supplemental answer, and the petitioner filed a supplemental reply.

22 Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate
23 Judge Edmonds for report and recommendation. The Magistrate Judge recommends the District
24 Court, after its independent review of the record, enter an order denying the Petition for Writ
25 of Habeas Corpus. Wrathall's consecutive sentences do not violate due process.

26 Also pending is a Motion for Relief by Default filed by the petitioner on September 3,
27 2008. The Magistrate Judge recommends the District Court deny the motion.
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1 Summary of the Case

2 Pursuant to a plea agreement consolidating four separate prosecutions, Wrathall pleaded
3 guilty to one count of sale of a dangerous drug and one count of attempted sale of a dangerous
4 drug. (Respondents' answer, p. 2; Exhibits B, C.) The offenses occurred in August of 2003
5 and August of 2004, respectively. *Id.*, Exhibit A. The second offense occurred while Wrathall
6 was on court ordered release for the first offense. *Id.* On February 10, 2005, the trial court
7 sentenced Wrathall to the presumptive sentence of five years' imprisonment for sale of a
8 dangerous drug and the presumptive sentence of three and one-half years' imprisonment for
9 attempted sale, the sentences to run consecutive. (Respondents' answer, p. 2., Exhibit B)

10 On April 26, 2005, Wrathall filed notice of post-conviction relief. *Id.* When appointed
11 counsel failed to identify any colorable claims, the trial court permitted Wrathall to file a
12 petition pro per. *Id.* Wrathall filed his petition on May 30, 2006, claiming the trial court erred
13 when it imposed consecutive sentences. *Id.* The trial court denied the petition on April 10,
14 2007. *Id.* The court of appeals denied review on November 16, 2007. *Id.*

15 On February 29, 2008, Wrathall filed the instant Petition for Writ of Habeas Corpus
16 pursuant to Title 28, United States Code, Section 2254. (Petition.) He argues (1) the trial court
17 erred by giving consecutive sentences based on the erroneous belief that he had a prior
18 conviction, and (2) the trial court erred by giving consecutive sentences without properly
19 considering the aggravating and mitigating circumstances.

20 The respondents filed an answer on April 21, 2008, arguing the claims are procedurally
21 defaulted. Wrathall filed a reply. This court ordered further briefing and the respondents filed
22 a supplemental brief addressing the merits of the petition on August 21, 2008. This brief was
23 filed after the court's deadline, and on September 3, 2008, Wrathall filed a Motion for Relief
24 by Default Against the Respondents for an Untimely Filing by Order. On September 12, 2008,
25 Wrathall filed a supplemental reply.

1 Discussion

2 The writ of habeas corpus affords relief to prisoners in custody in violation of the
3 Constitution or laws or treaties of the United States. 28 U.S.C. § 2241. If the petitioner is in
4 custody pursuant to the judgment of a state court, the writ shall not be granted unless prior
5 adjudication of the claim –

6 (1) resulted in a decision that was contrary to, or involved an unreasonable
7 application of, clearly established Federal law, as determined by the Supreme
Court of the United States; or

8 (2) resulted in a decision that was based on an unreasonable determination
9 of the facts in light of the evidence presented in the State court proceeding.

10 28 U.S.C. § 2254.

11 A decision is “contrary to” Supreme Court precedent if the “state court confronted a set
12 of facts that are materially indistinguishable from a decision of the Supreme Court and
13 nevertheless arrived at a result different from Supreme Court precedent.” *Vlasak v. Superior*
14 *Court of California ex rel. County of Los Angeles*, 329 F.3d 683, 687 (9th Cir. 2003). A
15 decision is an “unreasonable application” if “the state court identified the correct legal
16 principles, but applied those principles to the facts of [the] case in a way that was not only
17 incorrect or clearly erroneous, but objectively unreasonable.” *Id.* “It is not enough that our
18 independent review of the legal question leaves us with a firm conviction that the state court
decision was erroneous.” *Id.*

19 If the highest state court fails to explain its decision, this court looks to the last reasoned
20 state court decision. *See Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005). If the state court
21 denied on the merits but did not explain its reasoning, this court must independently review the
22 record to determine whether the state court decision was “objectively unreasonable” *Id.*

23 Federal review is limited to those issues that have been fully presented to the state court.
24 This so-called “exhaustion rule” reads in pertinent part as follows:

25 An application for a writ of habeas corpus on behalf of a person in custody
26 pursuant to the judgment of a State court shall not be granted unless it appears
27 that – (A) the applicant has exhausted the remedies available in the courts of the
State. . . .

1 28 U.S.C. § 2254(b)(1)(A). This rule permits the states “the opportunity to pass upon and
2 correct alleged violations of its prisoners’ federal rights.” *Duncan v. Henry*, 513 U.S. 364, 365
3 (1995) (internal punctuation removed).

4 To be properly exhausted, the federal claim must be “fairly presented” to the state courts.
5 *Picard v. Connor*, 404 U.S. 270, 275 (1971). In other words, the state courts must be apprised
6 of the legal issue and given the first opportunity to rule on the merits. *Id.* at 275-76.
7 Accordingly, the petitioner must “present the state courts with the same claim he urges upon the
8 federal courts.” *Id.* The state courts have been given a sufficient opportunity to hear an issue
9 when the petitioner has presented the state court with the issue’s factual and legal bases.
10 *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999).

11 In addition, the petitioner must explicitly alert the state court that he is raising a federal
12 constitutional claim. *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Casey v. Moore*, 386 F.3d
13 896, 910-11 (9th Cir. 2004). The petitioner must make the federal basis of the claim explicit
14 either by citing specific provisions of federal law or federal case law, even if the federal basis
15 of a claim is “self-evident,” *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999), *cert. denied*,
16 528 U.S. 1087 (2000), or by citing state cases that explicitly analyze the same federal
17 constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

18 If the petitioner is in custody pursuant to a judgment imposed by the State of Arizona,
19 he must present his claims to the state appellate court for review. *Castillo v. McFadden*, 399
20 F.3d 993, 998 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 348 (2005); *Swoopes v. Sublett*, 196 F.3d
21 1008 (9th Cir. 1999), *cert. denied*, 529 U.S. 1124 (2000). If state remedies have not been
22 exhausted, the petition may not be granted and should ordinarily be dismissed. *See Johnson v.*
23 *Lewis*, 929 F.2d 460, 463 (9th Cir. 1991). In the alternative, the court has the authority to deny
24 on the merits rather than dismiss for failure to exhaust. 28 U.S.C. § 2254(b)(2).

25 A claim is “procedurally defaulted” if the state court declined to address the issue on the
26 merits for procedural reasons. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002).
27 Procedural default also occurs if the claim was not presented to the state court and it is clear the
28 state would now refuse to address the merits of the claim for procedural reasons. *Id.* A claim

1 that is procedurally defaulted must be denied unless the petitioner can “demonstrate cause for
2 the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate
3 that failure to consider the claims will result in a fundamental miscarriage of justice.” *Boyd v.*
4 *Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998) (quoting *Coleman v. Thompson*, 501 U.S. 722,
5 750 (1991)).

6 In this case, the respondents argue Wrathall never informed the state courts that he was
7 raising a federal claim. They maintain he is procedurally barred from returning to state court
8 and raising the issue. Accordingly, they conclude his petition is procedurally defaulted. The
9 court does not agree.

10 In his petition for post-conviction relief, Wrathall specifically claimed that the trial
11 court’s consecutive sentences violated his “14th amendment rights to due process and equal
12 protection [under] the U.S. Constitution and Arizona law. . . .” (Respondents’ answer, Exhibit
13 F.) He raised the same argument before the state court of appeals. *Id.*, Exhibit J. This court
14 observes that Wrathall cited only state law cases in the body of his petition. Nevertheless, based
15 on Wrathall’s specific citation to federal constitutional law, this court concludes Wrathall
16 alerted the state courts that he was raising a claim under federal law. His issues therefore are
17 exhausted. *See also Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (“While the
18 petitioner must refer to federal law in state court explicitly, exhaustion is satisfied once the
19 petitioner makes that explicit reference even if the petitioner relies predominantly on state law
20 before the state courts.”).

21 The state court of appeals denied Wrathall’s petition for post-conviction relief but did
22 not address Wrathall’s federal constitutional claims. Accordingly, this court must
23 independently review the record to determine whether the state court’s decision was
24 “objectively unreasonable.” *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005). It was not.

25 In ground (1), Wrathall argues the trial court erred by giving him consecutive sentences
26 based on the erroneous assumption that he had a prior conviction. Wrathall did not have a prior
27 conviction, but he believes that because he pleaded guilty to two separate counts in two
28 consolidated cases, the trial court sentenced him as though one of those counts was a prior.

1 Defendants have a due process right to be sentenced based on accurate information. *U.S.*
2 *v. Jones*, 982 F.2d 380, 385 (9th Cir. 1992). If the trial court sentenced Wrathall based on an
3 erroneous belief that he had a prior, his sentence might violate due process. Wrathall, however,
4 misunderstands the trial court's reasoning.

5 The trial court sentenced Wrathall to consecutive sentences because selling drugs does
6 "great harm to our community and our children" and Wrathall committed his two offenses
7 approximately one year apart indicating that his involvement with illegal drugs was protracted
8 and deliberate. (Respondents' supplement, Exhibit K, p. 17.) The trial court never implied that
9 it thought Wrathall had a prior conviction. Wrathall's due process rights were not violated.

10 In ground (2), Wrathall argues the trial court erred by giving consecutive sentences
11 without properly considering the aggravating and mitigating circumstances. The failure of the
12 trial court to give Wrathall concurrent sentences, however, is at most an error of state law. The
13 writ of habeas corpus is not available to correct simple errors of state law. *Estelle v. McGuire*,
14 502 U.S. 62, 67, 112 S.Ct. 475, 480 (1991). To justify relief, Wrathall must show a violation
15 of his federal rights.

16 A state court's misapplication of its own sentencing laws (assuming there is one here)
17 does not violate due process thereby justifying federal habeas relief unless the petitioner can
18 show "fundamental unfairness." *Christian v. Rhode*, 41 F.3d 461, 469 (9th Cir. 1994); *See, e.g.,*
19 *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (Sentencing pursuant to an unconstitutional
20 statute violates due process.); *Murtishaw v. Woodford*, 255 F.3d 926, 969 (9th Cir. 2001)
21 (Sentencing based on an inapplicable statute violates due process.), *cert. denied*, 535 U.S. 935
22 (2002); *Marzano v. Kincheloe*, 915 F.2d 549, 552 (9th Cir. 1990) (A sentence unauthorized by
23 law is unconstitutional.); *U. S.v. Rapal*, 146 F.3d 661, 663 (9th Cir. 1998) (Vindictive sentencing
24 violates due process.); *U. S. v. Hanna*, 49 F.3d 572, 576-77 (9th Cir. 1995) (Sentencing based
25 on materially false and unreliable information violates due process.).

26 In this case, Wrathall cannot show his consecutive sentences are fundamentally unfair.
27 He pleaded guilty to two separate offenses. The applicable state law allows the trial court to
28 impose consecutive sentences. *See* A.R.S. § 13-708; *State v. Ward*, 200 Ariz. 387, 26 P.3d

1 1158 (App. 2001). The trial court imposed consecutive sentences because selling drugs does
2 “great harm to our community and our children” and Wrathall committed his two offenses
3 approximately one year apart indicating that his involvement in illegal drugs was protracted and
4 deliberate. (Respondents’ supplement, Exhibit K, p. 17.) Wrathall does not allege these reasons
5 were materially false or otherwise illegitimate. Wrathall’s due process rights were not violated.
6 *See also Souch v. Schaivo*, 289 F.3d 616, 623 (9th Cir. 2002) (“[N]either an alleged abuse of
7 discretion by the trial court in choosing consecutive sentences, nor the trial court’s alleged
8 failure to list reasons for imposing consecutive sentences, can form the basis for federal habeas
9 relief.”), *cert. denied*, 537 U.S. 859 (2002).

10 Wrathall further argues that the trial court weighed the equities in a manner that did not
11 ensure that similarly situated defendants are treated similarly. This bare allegation, however,
12 does not raise a proper claim under the equal protection clause.

13 “The fourteenth amendment’s equal protection clause announces a fundamental
14 principle: the State must govern impartially.” *McQueary v. Blodgett*, 924 F.2d 829, 834 (9th
15 Cir. 1991) (internal punctuation omitted). “General rules that apply evenhandedly to all persons
16 within the jurisdiction unquestionably comply with this principle.” *Id.* In this case, the state
17 statute allowing for consecutive sentences applies evenhandedly to all defendants. There is no
18 equal protection violation in the statutory scheme.

19 Wrathall argues the trial court’s equity analysis resulted in a sentence that was unfair to
20 *him* raising a challenge to the statute as actually applied. The equal protection clause, however,
21 only “guarantees equal laws, not equal results.” *Id.* at 835. It does not matter if somewhere
22 there exists a similarly situated defendant who received concurrent sentences. To state a
23 cognizable “as applied” claim, Wrathall must allege similarly situated defendants have
24 *systematically* received concurrent sentences and he is the exception to the rule. *Id.* This he has
25 not done.

26 In his Motion for Relief by Default, Wrathall argues he is entitled to default judgment
27 because the respondents did not file a timely supplementary answer. The respondents’ failure,
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1 however, does not entitle Wrathall to a default judgment. *See Gordon v. Duran*, 895 F.2d 610,
2 612 (9th Cir. 1990).

3 The default judgment rule, which is available in ordinary civil cases, does not apply to
4 petitions for habeas corpus. *Id.* A state prisoner, such as Wrathall, is entitled to federal habeas
5 relief only upon proving that “[h]e is in custody in violation of the Constitution or laws or
6 treaties of the United States.” 28 U.S.C. § 2241(c)(3). Wrathall has not made this showing.
7 He therefore is not entitled to judgment in his favor. *See also Aziz v. Leferve*, 830 F.2d 184,
8 187 (11th Cir. 1987) (“[A] default judgment is not contemplated in habeas corpus cases . . .”).

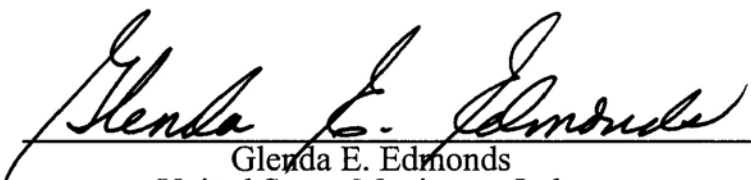
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10 RECOMMENDATION

11 The Magistrate Judge recommends that the District Court, after its independent review
12 of the record, enter an order DENYING the Petition for Writ of Habeas Corpus [doc. #1] and
13 DENYING the Motion for Relief by Default. [doc. # 12]

14 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within
15 10 days of being served with a copy of this report and recommendation. If objections are not
16 timely filed, they may be deemed waived.

17 The Clerk is directed to send a copy of this report and recommendation to the petitioner
18 and the respondents.

19 DATED this 20th day of October, 2008.

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23 
24 Glenda E. Edmonds
United States Magistrate Judge